

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1224 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DURGABHAI BABUBHAI

Versus

STATE OF GUJARAT

Appearance:

MS BANNA S DUTTA for Petitioner

MR DN PATEL, ADDL PUBLIC PROSECUTOR for Respondent No.1

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE R.P.DHOLAKIA

Date of decision: 02/03/98

ORAL JUDGEMENT (Per Patel, J.)

The appellant undergoing sentence for offences punishable under sections 17 and 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act), has preferred this appeal against the order of conviction and sentence recorded in N.D.P.S.

Case No. 6 of 1996 by the learned Additional Sessions Judge, Sabarkantha, Camp Modasa on 27.11.1997.

2. We have called for the Record and Proceedings of the case. Learned advocate appearing for the appellant after going through the Record and Proceedings, has made submissions.

3. Short facts of the case as it emerges from the records are as under:-

3.1 On 24.5.1996, information was received by police personnel that two persons are on way to village Jivanpur from Bamanwada with Opium and hence calling the two panchas, raid was arranged. After preparing first part of the panchnama in a Government vehicle, with members of the raiding party, they reached village Bamanwada. The person whose description was given along with a women were found coming and seeing the vehicle they tried to run away, but they were immediately apprehended, and on questioning they disclosed their name as Durgabhai Babubhai, [appellant-original accused No.1] and Phuliben, [wife of the appellant No.1]. The appellant was carrying an old polyethylene bag. He refused to take search of the police or panchas before search of his bag and he also refused to get searched through a gazetted officer. During the search, from the said polyethylene bag substance smelling like opium was recovered from a small plastic bag and another small cloth bag which were inside the polyethylene bag. The substances were weighed on a grocer's scale and the small plastic bag contained about 350 gms. while the small cloth bag contained about 650 gms. 50 gms. of samples from both the packages were taken as muddamal for analysis, which was thereafter sealed. Remaining muddamal was sealed in separate boxes, which were sealed as described in the panchnama.

4. On charge being framed, the accused appellant pleaded not guilty and contended that he is entirely innocent. However, the trial Court, considering the evidence placed on record, submissions made by the learned counsel and the explanation of the accused, held that the appellant is guilty for the offence for which he has been convicted. However, learned trial Judge acquitted the original accused No.2.

5. Learned advocate Ms. Banna Datta submitted that there is breach of section 50 of the NDPS Act inasmuch as the accused appellant was not taken to a gazetted officer and, therefore, benefit must go to the accused. Learned trial Judge has considered this aspect in detail.

However, we pointed out that there is sufficient evidence on record to show that he was offered that if he wants to get himself searched by a gazetted officer, he may be taken. However, he has refused to avail of that benefit under section 50 of the Act. Evidence of PSI Exh. 31, evidence of accompanying personnel Maljibhai Desai Exh.32, driver of the jeep Chatrasing Magansing Exh.37 have supported the version of the prosecution. FIR and panchanama also corroborates the same. Learned advocate could not point out any material from the evidence that the accused was not given an opportunity of taking him to the gazetted officer or any other officer as mentioned in section 50. Duty is cast on the officer who has to search requiring that an offender should be taken to a nearest gazetted officer or of any department mentioned in section 42 or to the nearest Magistrate, provided accused wants to avail of that benefit. The question arises of taking the person to be searched to the gazetted officer if he wants himself to be searched in presence of such officer. If he was asked and he has refused to be searched by a gazetted officer or the nearest Magistrate, question of committing breach does not arise.

6. Learned advocate Ms. Datta further submitted that there is delay of six days in forwarding the sample for analysis. The accused was searched on 24.5.1996 and the sample is received by the analysing laboratory on 1.6.1996. When it was received, it was intact as per the seal. The seals tallied with the specimen seals sent separately. Hence, there is no question of tampering with the sample. Expert Mahesh Chandra, Exh.25, has clearly stated that the samples which were forwarded were received intact and seals were as per the sample of the seal separately received, giving all the details of the sample. Thus, it is clear that the sample has reached the expert in a sealed condition. Learned judge has also considered this aspect in paragraph 26 of the judgment. Learned Judge has also considered the decision of this Court reported in 1996 GCD 61 GUJARAT in paragraph 23 of the judgment. In the circumstances, suffice it to say that a mere delay of six days would not destroy the prosecution case without anything more.

7. We have carefully considered the record and proceedings and the reasonings given by the learned trial Judge. We are in agreement with the findings arrived at by the learned trial Judge. We are, therefore, not discussing the evidence of each witness in detail in view of the observations made by the Honourable Supreme Court in the case of STATE OF KARNATAKA VS. HEMAREDDY reported

in AIR 1981 SC 1417, which reads as under:-

" This Court has observed in *Girija Nandini Devi v. Bigendra Nandini Choudry* (1967) 1 SCR 93 : (AIR 1976 SC 1124) that it is not the duty of the appellate Court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice"

In the result, this appeal stands dismissed.
csm./ -----